

GERROD G. WALKER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CSA LIMITED)	DATE ISSUED: 01/27/2010
)	
and)	
)	
INSURANCE COMPANY OF THE STATE)	
OF PENNSYLVANIA)	
)	
Employer/Carrier-)	
Respondents)	Decision and Order

Appeal of the Supplemental Decision and Order-Partial Award of Attorney Fees & Litigation Costs of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Barry R. Lerner (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, for claimant.

John Schouest and Limor Ben-Maier (Wilson, Elser, Moskowitz, Edelman & Dicker, LLP), Houston, Texas, for employer/ carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order-Partial Award of Attorney Fees & Litigation Costs (2008-LDA-00241) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On May 1, 2006, claimant was assaulted by a co-worker during the course of his employment for employer in Kuwait. Claimant alleged that this incident aggravated a pre-existing psychological condition and subsequently contributed to post-traumatic stress disorder (PTSD). In his Decision and Order, the administrative law judge found that the work incident aggravated claimant's pre-existing depression and anxiety, which led to physical symptoms that caused claimant to miss time from work in Kuwait. The administrative law judge found that the sick leave claimant took resulted in a loss of wage-earning capacity of \$43.62 per week from May 10 to July 26, 2006.¹ The administrative law judge found that claimant did not establish that, after he left Kuwait, the occurrence of stress-related physical symptoms in 2007 was due to PTSD associated with the May 2006 assault. The administrative law judge found that claimant failed to establish that the work injury was the reason he stopped working for employer in Kuwait in August 2006. The administrative law judge found that nine office visits claimant had with Dr. McArdle from July 2007 to March 2008 were related to resolving consequences from the work incident and that employer is liable for this reasonable and necessary treatment, costing \$2,640. 33 U.S.C. §907. The administrative law judge found that employer is not liable for anti-depressant medication claimant took in 2008 and for two office visits with Dr. DeRosales in November 2007 and January 2008.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting a fee of \$25,080, representing 46.5 hours of attorney time by Barry Lerner, and 16.2 hours of attorney time by David Barnett, at \$400 per hour, plus costs of \$1,318.66. In his Supplemental Decision, the administrative law judge reduced the hourly rate of Mr. Lerner to \$375, and that of Mr. Barnett to \$325, based on their respective years of experience. The administrative law judge next addressed employer's objections to specific entries in the fee petition. Mr. Lerner's total hours were reduced by 1.5 hours to 45 and Mr. Barnett's total hours were reduced by 2.5 hours to 13.7. The administrative law judge next addressed the amount of an appropriate fee in light of the level of success achieved, pursuant to *Hensley v. Eckerhart*, 461 U.S. 421 (1983). The administrative law judge computed the lodestar amount of attorney fees as \$21,327.50 by multiplying the number of allowed hours by the awarded hourly rates. The administrative law judge found that a reduction of approximately 85 percent from this lodestar amount of \$21,327.50 is proportionate to claimant's degree of success. Accordingly, the administrative law judge awarded claimant's counsel a fee of \$3,199.13, and costs totaling \$1,318.66.

¹ The administrative law judge used the average weekly wage suggested by employer under Section 10(c), 33 U.S.C. §910(c), of \$1,335.68 to calculate claimant's loss of wage-earning capacity, and he rejected claimant's suggested average weekly wage of \$1,468.61.

On appeal, claimant challenges the administrative law judge's award of a reduced attorney's fee. Claimant argues that the administrative law judge improperly reduced the lodestar fee by 85 percent based on the level of success he achieved. Claimant argues that, once the administrative law judge determined that the issues presented in this case were too inter-related to specifically allocate the amount of time counsel expended on each issue, it was improper for the administrative law judge to apply an across-the-board reduction to the lodestar fee. Employer responds, urging affirmance. Claimant has filed a reply brief.

We reject claimant's contention that the administrative law judge erred by reducing the lodestar fee of \$21,327.50 by 85 percent based on claimant's partial success litigating inter-related issues. In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434; see also *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). Where claimant failed to succeed on an unrelated claim, claimant's counsel is not entitled to a fee for work expended on the unsuccessful claim. *Hensley*, 461 U.S. at 435. Where, as here, the administrative law judge found that the claims involve a common core of facts or are based on related legal theories, the Court stated that the court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, *i.e.*, the lodestar figure, may result in an excessive award. The Court stated that the fee award should be for an amount that is reasonable in relation to the results obtained, as the degree of success is the most critical factor. *Hensley*, 461 U.S. at 435-437, 440. Therefore, while the Court did not provide a rule or formula for calculating a fee in cases where counsel achieves partial success litigating inter-related issues, the Court clearly did not hold that in such cases the lodestar fee is not subject to further reduction based on the degree of success. Moreover, the courts have recognized the broad discretion of the factfinder in

assessing the amount of an attorney's fee pursuant to *Hensley* principles. *Id.* at 436; *see, e.g., Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001); *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT).

In this case, the administrative law judge found that claimant achieved only partial success in the pursuit of the claim. Specifically, the administrative law judge found that claimant sought \$121,190.86 in disability compensation through 2008, with continuing temporary partial disability compensation thereafter of over \$40,000, and medical benefits for \$405 in prescriptions, visits with his treating physician, and \$2,640 for psychotherapy. The administrative law judge found that claimant's actual recovery was limited to approximately \$320 in temporary partial disability compensation from May 10 to July 26, 2006, and \$2,640 for psychological therapy. Based on the disparity between claimant's actual recovery and his claimed entitlement, the administrative law judge accepted employer's argument for an 85 percent reduction in the lodestar fee of \$21,327.50. Supplemental Decision and Order at 10.

The administrative law judge's finding that a reduced fee was warranted in this case is rational and consistent with *Hensley*. The Board has previously affirmed across-the-board reductions where the administrative law judge determined that claimant achieved limited success. *See Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999) (50 percent reduction in an attorney's fee is reasonable given claimant's limited success in establishing causation and entitlement to medical benefits, but not disability benefits); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999) (90 percent reduction in an attorney's fee is reasonable given claimant's limited success in establishing entitlement to medical benefits, but not temporary total disability benefits); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000) (75 percent reduction in attorney's fees is reasonable given claimant's failure to succeed in the prosecution of his primary claim for permanent total and partial disability compensation). Under the circumstances of this case, the administrative law judge's decision to reduce the lodestar fee of \$21,327.50 by 85 percent is affirmed, as claimant has not established an abuse of discretion in this regard. Claimant does not challenge any other aspect of the fee award of \$3,199.13, plus costs. Therefore, it is affirmed.

Accordingly, the administrative law judge's Supplemental Decision and Order-Partial Award of Attorney Fees & Litigation Costs is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge